STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY D/B/A Ameren/CILCO	)	
	)	No. 05-0160
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	
CENTRAL ILLIONOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS	)	
	)	No. 05-0161
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	
ILLINOIS POWER COMPANY d/b/a AmerenIP	)	
	)	No. 05-0162
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	

REPLY IN SUPPORT OF
MOTION TO STAY IMPLEMENTATION OF 2007 TARIFFS

The People of the State of Illinois ("the People"), by and through the Illinois Attorney General, Lisa Madigan, hereby file this Reply in support of the People's motion to stay implementation of certain 2007 tariffs authorized by the Illinois Commerce Commission ("ICC" or "Commission") in this docket. Contrary to assertions by the Ameren Companies ("Ameren") and ICC Staff, the People have a reasonable

likelihood of prevailing on the merits of their appeal, there is adequate justification for a stay, and the People's request for a stay is timely. Therefore, the People respectfully request the Commission to stay Ameren's market-based tariffs for electric service that the Commission has not "declared competitive" from going into effect on January 2, 2007, pending final disposition of the Appeal currently pending in the Illinois Appellate Court, Second District, under docket number 2-06-0381.

I. There is adequate justification for a stay.

Staff acknowledges that the Commission has discretionary power to stay the effect of its orders pursuant to 220 ILCS 5/10-113 and notes that "the Commission is guided by traditional factors used by reviewing courts to grant interlocutory injunctive relief." Staff Response at 2. Those "traditional factors" are discussed in *Stacke* 138 Ill. 2d 295, 562 N.E.2d 192 (1990), a case which Ameren cites (Ameren Response at 6-7). The "traditional factors" include whether the movant has a likelihood of success on the merits, whether failure to grant the stay will result in irreparable harm, and whether granting the stay will cause a party to suffer undue hardship. *Stacke v. Bates*, 138 Ill. 2d at 309.

Significantly, in *Stacke* the Supreme Court refused to adopt a rigid check-list limiting stays to cases satisfying every single one of these factors. The Court held that "it is not desirable to adopt a specific set of factors" governing the granting of stays, and expressly rejected "a ritualistic formula which specifies the elements a court may consider in

passing on a motion to stay, and which limits the court's consideration to those elements." *Id.* at 304-305, 308. Instead, a "court should have a wide degree of latitude when exercising its discretion." *Id.* at 305.

Although the *Stacke* Court discussed the "likelihood of success" factor on which Ameren places so much weight (Ameren Response at 7-8), the Court noted that this factor must "*not* be the sole factor reviewed." 138 Ill. 2d at 304 (emphasis added). Moreover, the Court made it clear in *Stacke* that the "likelihood of success" factor is not the high hurdle that Ameren and Staff presume it to be. (Ameren Response at 7-8; Staff Response at 3.) A party seeking a stay is not required "to show a probability of success on the merits" in every case. *Id.* at 309. Rather, it is sufficient to "present a substantial case on the merits and show that the balance of equitable factors weighs in favor of granting the stay." *Id.* at 309. As discussed in Section III below, the People "present a substantial case on the merits" in their appeal and have a "probability of success on the merits." *Id.* at 309.

A court or agency considering a stay should engage in a "balancing process as to the rights of the parties, in which all the elements bearing on the equitable nature of the relief sought should be considered." *See id.* at 308-309. In the instant case, where the balance of equities favors a stay, Ameren claims that it, rather than ratepayers, will suffer irreparable harm if a stay is granted. The Supreme Court noted in *Stacke* that the hardship to the respondent is "not the

controlling factor and it should be considered in light of the other factors." *Stacke*, 138 Ill. 2d at 307.

The People submit that Ameren is in a much better position to bear the effects of a stay than ratepayers -- especially those ratepayers who do not qualify for existing assistance programs. Unless the Commission orders a stay, ratepayers may have difficulty obtaining a refund if the 2007 rates are found to be illegal after they go into effect and, in the meantime, many ratepayers will be forced to choose between electricity and other basic necessities of life. *See* Rubin affidavit at 3 (noting the "serious trade-offs" families must make when energy costs increase, which include "foregoing needed medical care, food, telephone service, child care, and other necessities.")

The granting of a stay pending appeal is preventive or protective and seeks to maintain the status quo pending appeal. *Stacke*, 138 Ill.2d at 309. As noted in the People's motion, a stay of implementation of the 2007 tariffs pending the resolution of the People's appeal is necessary to preserve the status quo and ensure effective appellate review. Ameren argues that maintaining the status quo requires that the dramatic rate increases predicted to result from the 2007 tariffs be allowed to take effect. That is incorrect.

The simple fact that tariffs were filed in June does not mean that rate hikes are the "status quo." Those rates have not yet gone into effect. From a ratepayers' perspective, the status quo is the electric rate they

pay today – not a rate filed in June that is scheduled to go into effect on January 2, 2007. That is the status quo that the People seek to protect in their request for a stay.

A stay pending judicial review would clearly be in the public interest. Absent a stay, radically new rates will go into effect without *any* judicial review. In this case, "the balance of equitable factors weighs" heavily in favor of a brief stay pending review of the new rates by the Appellate Court. *See id.* at 309.

II. The People's request for a stay is timely.

Staff suggests that the People should have filed a motion for a stay earlier. (Staff Response, at 2.) This is simply wrong. The People's request for a stay is timely.

Moreover, the People took steps to avoid the need for a stay in this matter by requesting that the Second District Appellate Court set an expedited briefing schedule to ensure judicial review of the legality of the 2007 rates *before* they go into effect. The Appellate Court granted the People's request for an expedited briefing schedule and, aside from an extension of time requested by the Commission, the briefs were filed in accordance with that schedule.

The Appellate Court may well issue a decision before the new rates are scheduled to go into effect on January 2, 2007. Indeed, 220 ILCS 5/10-201(e)(i) provides that appeals of Commission orders shall have priority over all other civil proceedings pending before the court, except

election contests. However, if the Appellate Court is not able to act by the end of the year, a stay pending issuance of a decision would ensure that the new rates do not go into effect without judicial review.

The People have filed this request for a stay as a precaution, now that time is growing short. Such a precaution seemed unnecessary a month ago, when the last round of briefs were filed. Today, the People's request for a stay is timely and appropriate.

III. The People have a reasonable likelihood of prevailing on the merits of their appeal.

Ameren and Staff fail to acknowledge that the issue that the People have raised on appeal is an issue of first impression and is a question of law which the Court reviews *de novo*:

> Whether the Commission has authority to approve market-based rates for electric service that has not been declared competitive.

Although the Commission has found that it can approve market-based rates for service that has not been declared competitive, there is a substantial basis for disagreement. The People have a reasonable likelihood of prevailing on the merits, based on the arguments set forth in Sections A – D below.

A. The Commission Exceeded Its Statutory Authority By Approving Mandatory Market-Based Rates For Electric Service That Has Not Been Declared Competitive Pursuant To Section 16-113(a) Of The Public Utilities Act.

PUA Section 16-103(c) expressly authorizes market-based retail rates for electric service that has been declared competitive pursuant to

PUA Section 16-113(a). 220 ILCS 5/16-103(c), 5/16-113(a).[1] But there is no language in Section 16-103(c) or elsewhere in the PUA that authorizes the ICC to approve market-based rates for retail customers who do not have electric service that has been declared competitive. This is a bright-line rule: a service either has been declared competitive or it has not, and market-based rates cannot be charged for services that have not been declared competitive.

In this case, the Commission exceeded its statutory authority by approving market-based retail rates for almost five million Ameren customers who do not have electric service that has been declared competitive. As a consequence, these customers will be forced to pay market-based rates set through an annual auction and to bear *all* of the risk and uncertainty associated with volatile wholesale energy markets. This is precisely the type of problem that the General Assembly sought to avoid by authorizing market-based rates only after a retail electric service that has been declared competitive.

[1] In order for an electric service to be "declared competitive," a utility must petition the Commission and present evidence demonstrating that the utility's customers could potentially purchase service comparable to service offered by the utility from a supplier other than the utility. 220 ILCS 5/16-113(a).

1. The Commission Cannot Abdicate Its Statutorily Mandated Regulatory Role Under The Public Utilities Act.

When competition develops in Illinois retail electric markets, consumers will be able to choose between competing electric suppliers, such as utilities that re-sell electricity purchased in volatile wholesale markets (because they chose to divest their generation[2]), or alternative suppliers that sell electricity at lower prices (perhaps because they own generating facilities.) 220 ILCS 5/16-113(a) (SA.6). Unless or until the Commission issues a competitive declaration confirming that consumers have competitive choices for an electric service, the PUA prohibits the Commission from approving market-based rates for that service.

The Commission cannot abdicate its statutorily-mandated regulatory role, leaving captive customers exposed to the vagaries of the market. Thus, in their appeal, the People ask the Appellate Court to reverse the Commission's order approving the Ameren tariff filings because the Commission lacks authority to approve market-based rates

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[2] In 1997, the PUA was amended to allow electric utilities, which have historically been vertically integrated companies, to divest their generating plants during the "transition period" from regulation to competition. 220 ILCS 5/16-111(g). Ameren chose to transfer ownership of their generating capacity to unregulated corporate affiliates before competition developed in Illinois. Those affiliates are using the auction to double the price of electricity sold from these generating facilities to the plants' former owners (Ameren) and the higher prices are automatically passed through to consumers in the new market-based rates. (05-0159 C.06433 (People Exhs. 3.0-3.5); 05-0160/61/62 C.07390 (People Exhs. 3.0-3.4)). In contrast, when the Commission sets regulated rates, those rates have traditionally been capped at cost plus a reasonable rate of return for the utility. 220 ILCS 5/9-202(a).

for electric service that has not been "declared competitive." 220 ILCS 5/10-201(e)(iv)(B), (C) (court shall reverse when Commission acts without jurisdiction or contrary to law.) On remand, the Commission should require Ameren to propose new tariffs that do not expose captive customers to the risks inherent in market-based rates.

2. The Commission Cannot Impose Mandatory Market-Based Rates Simply Because Ameren Decided To Divest Its Generating Capacity.

Although the Commission claims that "it is difficult to see by what means" rates would be established if market-based rates were not used, there are numerous alternative approaches that could be used until such time as competitive markets develop. Traditional regulatory standards of least-cost, justness, reasonableness, prudence, and reasonable rate of return could easily be adapted for use with utilities that have divested their generating capacity. See, *e.g.*, 220 ILCS 5/8-401; 220 ILCS 5/9-101 *et seq.* Nor is there any validity to the Commission's assertion that "utilities without generation would be left with no 'legal' means of procuring supply" for services that have not been declared competitive if the utilities' market-based rate proposals were not approved.

In the absence of competition, regulatory safeguards are necessary to create incentives for utilities to minimize costs. The Orders do not include any incentives for Ameren to minimize costs to their customers. Both utilities are allowed to automatically pass through the "market

prices" produced by the auction and customers are required to pay those costs because they lack competitive choices.

There are many alternatives to the auction – alternatives that include incentives for utilities to minimize costs to their customers. The Commission could, for instance, create incentives for utilities to actively negotiate with the lowest cost suppliers for the lowest price by capping the amount that utilities can pay for electricity. 220 ILCS 5/8-401 (every public utility subject to this Act shall provide service and facilities which constitute the least-cost means of meeting the utility's service obligations.) Similar results could be achieved by limiting cost-recovery to a "just and reasonable" level when a utility buys electricity at a price that results in more than a reasonable rate of return for the seller. See, *e.g.*, 220 ILCS 9-101, 9-201(c), 9-202(a), 9-211.

B. The Plain Language of PUA Section 16-103(c) Authorizes Mandatory Market-Based Rates Only for Electric Service That Has Been Declared Competitive.

"The cardinal rule of statutory interpretation, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature. In determining the legislative intent, a court should first consider the statutory language. . . ." People v. Maggette, 195 Ill. 2d 336, 348, 747 N.E.2d 339, 346 (2001); Vestrup v. DuPage County Election Comm'n., 335 Ill. App. 3d 156, 161, 779 N.E.2d 376 (2nd Dist. 2002). "When the drafters' intent can be ascertained from the statutory language, it must be given effect without resort to other aids for

construction." Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 479, 639 N.E.2d 1282, 1287 (1994) (citing People v. Bryant 128 Ill. 2d 448, 455, 539 N.E.2d 1221 (1989)); see also Garcia v. Nelson, 326 Ill. App. 3d 33, 38, 759 N.E.2d 601, 606 (2nd Dist. 2001).

Section 16 -103(c) of the PUA expressly mandates the use of market-based prices to establish the cost of electric service that has been "declared competitive" pursuant to Section 16-113(a):

> Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. For those components of the service which have been declared competitive, cost shall be the market based prices. . . .

220 ILCS 5/16-103(c)(emphasis added). This language was enacted in 1997, when the PUA was amended to allow competition in the electricity sector in Illinois and to authorize the Commission to use "market based prices" to set rates for customers who have competitive choices. Electric Service Customer Choice and Rate Relief Law of 1997, P.A. 90-561, § 103(c), codified at 220 ILCS 5/16-103(c).

The last three sentences of Section 16-103(c) expressly authorize the use of "market based prices", but only after service has been declared competitive. Neither this section nor any other provision of

the PUA authorizes the use of "market based prices" for tariffed service that has not been declared competitive. In addition, section 16-103(c) also specifically states that residential and small commercial customers are entitled to continue receiving the same tariffed service that was offered to them before the 1997 PUA amendments:

> Notwithstanding any other provision of this Article, each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997. . . .

220 ILCS 5/16-103(c) (emphasis added).

1. PUA Section 16-103(c) Must Be Construed So That Each Word, Clause, And Sentence Is Given A Reasonable Meaning And Nothing Is Rendered Superfluous.

The plain text of Section 16-103(c) authorizes market-based rates only after a service has been declared competitive. Any other interpretation would render meaningless the phrases that begin the first three sentences in the section: (1) "Notwithstanding any other provisions of this Article, each electric utility shall continue offering . . ." ; (2) "Upon

declaration of the provision of electric power and energy as competitive . . .”; and (3) “For those components of the service which have been declared competitive . . . .” 220 ILCS 5/16-103(c) (SA.4).

The Illinois courts have soundly rejected constructions of statutes, including the PUA, that render words or phrases superfluous. *See* Commonwealth Edison Co. v. Illinois Commerce Comm'n, 332 Ill. App. 3d 1038, 1051, 775 N.E.2d 113, 126 (2nd Dist. 2002) (citing A.P. Properties, Inc. v. Goshinsky, 186 Ill. 2d 524, 532, 714 N.E.2d 519 (1999)). Courts consider each word, clause and sentence because the courts “’will not assume that the legislature engaged in a meaningless act.’” Emerald Casino, Inc. v. Illinois Gaming Board., 346 Ill. App. 3d 18, 33, 803 N.E.2d 914 (1st Dist. 2003) (quoting Fumarolo v. Chicago Board of Education, 142 Ill. 2d 54, 97, 566 N.E.2d 1283 (1990)); *see also* Emerald Casino, Inc. v. Illinois Gaming Board, 366 Ill. App. 3d 113, 851 N.E.2d 843 (1st Dist. 2006).

2. PUA Sections 16-103(a) And (c) Must Be Read To Incorporate The “Tariffed Service” / “Competitive Service” Dichotomy Set Forth In 220 ILCS 5/16-102.

The 1997 PUA Amendments clearly distinguish between tariffed service and competitive service:

> "Tariffed service" means services provided to retail customers by an electric utility as defined by its rates on file with the Commission pursuant to the provisions of Article IX of this Act, but shall not include competitive services.

"Competitive service" includes (i) any service that has been declared to be competitive pursuant to Section 16-113 of this Act . . .

220 ILCS 5/16-102 (emphasis added).

Sections 103(a) and (c) reflect this clear distinction between tariffed service and competitive service. PUA Section 16-103(a) guarantees continuation of tariffed service to all retail customer classes until such time as the service is declared competitive by the Commission or formally abandoned by the utility:

An electric utility shall continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997 until the service is (i) declared competitive pursuant to Section 16-113, or (ii) abandoned pursuant to Section 8-508 . . . .

220 ILCS 5/16-103(a)(emphasis added). The price for "competitive service" is set by the market – whether it is offered by a utility or one of the utility's competitors. Electric utilities are not required to offer competitive services. 220 ILCS 5/16-103(e).

When a service offered to residential or small commercial customers is declared competitive, the customer has the option of purchasing "competitive service" at prices set by the market or continuing to take "tariffed service" from the utility at prices set by the

Commission. 220 ILCS 5/16-103(c) (SA.4). After a competitive declaration, the Commission is authorized to use market prices to determine the rates that utilities can charge for "tariffed service" offered to these customer classes: "For those components of the service which have been declared competitive, cost shall be the market based prices." 220 ILCS 16-103(c) (SA.4). Residential and small commercial customers that switch from the utility's "tariffed service" to "competitive service" must pay market prices.

The resolution of the People's appeal rests in large part on this key distinction between tariffed service and competitive service. The Commission cannot require customers that don't have service that has been declared competitive to pay market-based rates. Sections 103(a) and (c) must be read to incorporate the tariffed service/competitive service dichotomy set forth in the PUA definitions section, 220 ILCS 5/16-102, because "[e]ach section should be construed with every other part or section of the same statute to produce a harmonious whole." West Suburban Bank v. City of West Chicago, No. 2-05-0794 (2nd Dist. July 28, 2006), slip op. at 5.

Ameren customers who do not have service that has been declared competitive are entitled to "tariffed service" at rates determined by the Commission rather than by the market. The Commission has no discretion on this point – and the Commission cannot "delegate" this rate-setting function to the market. Consequently, the Commission

exceeded its statutory authority by approving market-based rates set automatically through an auction for Ameren customers who do not have service that has been declared competitive.

C. The General Assembly's Use of Express Language to Specifically Authorize Market-Based Rates in Certain Clearly Defined Circumstances, Excludes the Possibility That the General Assembly Intended to Authorize Market-Based Rates in the Absence of Those Circumstances.

One rule of statutory construction that clearly applies here is the maxim *expressio unius est exclusio alterius, i.e.*, to express or include one thing implies the exclusion of the other, or of the alternative. Black's Law Dictionary 620 (8th ed. 2004). The Illinois Supreme Court has noted that:

> This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written. 2A N. Singer, Sutherland on Statutory Construction § 47.24, at 228, § 47.25, at 234 (5th ed.1992).

Metzger v. DaRosa, 209 Ill. 2d 30, 44, 805 N.E.2d 1165, 1172 (2004); *see also* People v. Danenberger, 364 Ill. App 3d 936, 945, 848 N.E.2d 637, 645 (2nd Dist. 2006); Vestrup, 335 Ill. App. 3d at 164; People v Doyle, 217 Ill. App. 3d 770, 775, 578 N.E.2d 15, 18 (2nd Dist. 1991).

In the Orders that are on appeal in 2-06-0381, the Commission failed to recognize that the General Assembly's express authorization of market-based rates for one type service necessarily implies the exclusion of market-based rates for other types of service. The Commission was explicit on this point:

> [T]he presence of a statutory mandate to use a particular method for establishing certain cost components for competitive services does not somehow mean that method is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).

The Commission was flatly wrong in this regard. As discussed below, the General Assembly's express language authorizing market-based rates in certain clearly defined circumstances does "somehow mean" that market-based rates cannot be imposed in the absence of those circumstances.

1. The General Assembly's Use of Express Language in Section 16-103(c) to Specifically Authorize Market-Based Rates After Service Has Been Declared Competitive Excludes the Possibility That the General Assembly Intended to Authorize the Use of Market-Based Rates Before Service Has Been Declared Competitive.

Applying the maxim *expressio unius est exclusio alterius* to Section 16-103(c) clearly demonstrates that "market based prices" are authorized only after an electric service has been declared competitive. The General

Assembly used express language, in Section 16-103(c), to specifically authorize market-based rates after service has been declared competitive. There is no language in the PUA that authorizes market-based rates before service has been declared competitive. This clearly indicates that the General Assembly intended to authorize the use of market-based rates only after service has been declared competitive, but not before service has been declared competitive.

Significantly, the General Assembly's decision to expressly authorize the use of market-based rates after service has been declared competitive represented a major departure from almost a century of regulation. If the General Assembly had intended to make a change of similar magnitude for services that have not been declared competitive, surely it would have said so expressly. See Martin v. Franklin Capital Corp., 126 S. Ct. 704, 709 (2005); In re Marriage of Thompson, 357 Ill. App. 3d 854, 858 (2nd Dist. 2005). Giving effect to settled principles of statutory construction and Supreme Court precedent requires that Section 16-103(c) be read as authorizing market-based rates only after service has been declared competitive.

2. The General Assembly's Use Of Narrowly-Tailored Language Authorizing A Voluntary Market-Based Rate For Certain Noncompetitive Services, Necessarily Excludes The Possibility That The General Assembly Intended To Impose Mandatory Market-Based Rates On All Noncompetitive Services.

Further evidence that the General Assembly did not authorize the Commission to impose mandatory market-based rates on customers who do not have service that has been declared competitive can be found in the PUA "real-time pricing" provisions. Real-time prices are "tariffed retail charges for delivered electric power and energy that vary hour-to-hour and are determined from wholesale market prices . . . ." 220 ILCS 5/16-102 (emphasis added). The General Assembly expressly authorizes utilities to offer this market-based rate as an optional rate that is available to all customers, including those who do not have service that has been declared competitive.

The 1997 Amendments to the PUA required electric utilities to offer real-time prices that vary on an hour to hour basis to nonresidential retail customers, beginning in 1998. 220 ILCS 5/16-107(a). Electric utilities were also required to offer a real-time pricing option to residential customers, beginning in 2000. 220 ILCS 5/16-107(b). The real-time prices initially offered to residential customers were required to "vary on a periodic basis during the day" rather than hourly. 220 ILCS 5/16-102.

Earlier this year, the General Assembly amended the real-time pricing provisions, emphasizing that "all classes of the electricity customers of electric utilities should have access to and be able to voluntarily use real-time pricing . . . ." P.A. 94-0977, eff. 6-30-06, to be codified at 220 ILCS 5/16-101A(f) (emphasis added). The 2006 PUA Amendments require electric utilities to file new tariffs "allowing residential retail customers in the electric utility's service area to elect real-time pricing" that varies on an hour to hour basis, beginning January 2, 2007. P.A. 94-0977, eff. 6-30-06, to be codified at 220 ILCS 5/16-107(b-5)(emphasis added); 5/16-102. The Commission can approve such a tariff only if it finds that implementing the tariff "will result in net economic benefits to all residential customers of the electric utility." 220 ILCS 5/16-107(b-5).

The real-time pricing provision is the only PUA provision that authorizes utilities to charge a market-based rate for service in the absence of a competitive declaration – and there are two major restrictions on that authority. First, this market-based rate can be offered only as an optional rate. 220 ILCS 5/16-107(b-5). Second, real-time pricing can be offered to residential consumers only if the Commission finds that there is a net benefit for residential customers. 220 ILCS 5/16-107(b-5).

The General Assembly used narrowly-tailored express language to authorize this specific type of market-based rate for customers who do

not have service that has been declared competitive, to require that utilities offer it as an option that consumers can voluntarily choose, and to limit availability to residential customers for whom a net benefit has been proven. The General Assembly's use of express language to authorize voluntary market-based rates for service that has not been declared competitive under clearly-defined circumstances cannot be reconciled with the ICC's holding that the General Assembly intended to authorize mandatory market-based rates for all customers that do not have service that has been declared competitive. Indeed, the use of narrowly-tailored express language in connection with this voluntary market-based rate necessarily excludes the possibility that the General Assembly intended – without even saying so – to impose a mandatory market-based rate on customers who lack competitive service.

D. The 1997 Amendments Expressly Retained A Traditional Regulatory Framework To Protect Consumers That Have Service That Has Not Been Declared Competitive.

For almost a century, the Commission has been responsible for regulating electric rates to ensure that they are "just and reasonable" and based on "costs prudently and reasonably incurred" by Illinois electric utilities to serve their customers. 220 ILCS 5/9-101, and 5/1-102(a)(iv). The PUA directs the Commission to ensure that Illinois citizens have access to "adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens."

220 ILCS 5/1-102. When the PUA was amended in 1997, the General Assembly expressly retained these protections for consumers that lack service that has been declared competitive.

1. Illinois Was The First State In The Nation To Regulate Prices Charged By Industries "Affected With The Public Interest."

In 1871, Illinois became the first state in the nation to regulate industries "affected with a public interest" when the General Assembly enacted a law to regulate the prices charged by grain warehouses. See Munn v. Illinois, 94 U.S. 113, 114 (1877). This groundbreaking legislation was upheld by the United States Supreme Court in Munn, 94 U.S. at 126. Since then, Illinois has consistently regulated prices for essential services when competition fails to operate as a "self-generating regulatory force" to discipline prices. See John Kenneth Galbraith, American Capitalism, 112-113 (Boston: Houghton Mifflin, 1952).

In 1921, the Illinois General Assembly enacted the PUA.[3] Although the Act has been amended several times since then, the basic regulatory objective has remained unchanged: "public utilities shall continue to be regulated effectively and comprehensively." 220 ILCS 5/1-102.

[3] The Public Utilities Act of June 30, 1913 (1913 Ill. Laws), was repealed by the Public Utilities Act of 1921 (1921 Ill. Laws 702), which reenacted the general regulatory provisions of the former act in substantially the same form. The 1921 act has since been amended by, *inter alia,* P.A. 84-617 (eff. Jan 1, 1986), P.A. 86-1475 (eff. Jan 10, 1991); P.A. 92-22 (eff. 6-30-01); P.A. 89-42 (eff. Jan. 1, 1996); P.A. 90-561 (eff. Dec. 12, 1997); P.A. 91-50 (eff. June 30, 1999); P.A. 92-537 (eff. June 6, 2002); P.A. 92-690 (eff July 19, 2002); P.A. 94-0977 (eff. June 30, 2006).

In 1997, when the General Assembly amended the PUA to allow competition in the electric sector for the first time, the transition to competition was structured so that retail rates could be based on market prices in circumstances where the Commission finds sufficient competition to declare a service competitive pursuant to Section 16-113(a). 220 ILCS 5/16-113(a). For those services that do not yet meet the criteria to be declared competitive, the General Assembly requires rates to continue to be determined by the Commission through the process of regulatory review defined in Article IX of the PUA – rather than using wholesale electricity prices to set rates. 220 ILCS 5/9-201 *et seq.*

This legal and policy construct is logical, just, and reasonable. In contrast, the Commission's interpretation of the 1997 Amendments presumes that the General Assembly intended to abandon government regulation of prices in 2007, whether or not there is sufficient competition in the wholesale and retail markets to discipline prices. This approach flies in the face of basic economics and unfairly subjects captive customers to unreasonable prices.

2. The 1997 Amendments Specifically Recognize That, In The Absence Of Retail Competition, The Commission Will Continue To Set Regulated Rates In 2007 And Beyond.

The 1997 Amendments expressly recognize that the General Assembly expects that, after January 1, 2007, the Commission will continue to set regulated rates for electric service that has not been declared competitive. PUA Section 16-111(i) specifically discusses

criteria that the Commission is to use in regulating rates "subsequent to the mandatory transition period and prior to the time that the provision of such electric service is declared competitive." 220 ILCS 5/16-111(i). The "mandatory transition period", which began on the effective date of the 1997 Amendments, ends on January 1, 2007. 220 ILCS 5/16-102.

PUA Section 16-111(i) sets forth various factors that the Commission must consider in any post-2006 proceeding to establish rates for tariffed services that have not been declared competitive:

> . . . In determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of such electric service is declared competitive, the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value . . . and, if the electric power and energy component of such tariffed rate exceeds the market value by more than 10% for any customer class, may establish such electric power and energy component at a rate equal to the market value plus 10% . . .

220 ILCS 5/16-111(i)(emphasis added).

This language clearly demonstrates that the General Assembly expects that, after January 1, 2007, the Commission will continue to set regulated rates for electric utility customers who take service that has not been declared competitive. Indeed, that is the only possible reading of this section that is in harmony with PUA Section 16-103(c). As discussed above, Section 16-103 (c) authorizes the Commission to set market-based rates only for service that has been declared competitive.

Basic rules of statutory construction require the Commission to "consider the entire statute and interpret each of its relevant parts together." Maggette, 195 Ill. 2d at 348. Statutes "must be construed in harmony with one another if reasonably possible." Knolls Condominium Association v. Mary E. Harms, 202 Ill. 2d 450, 459, 781 N.E.2d 261, 267 (2002), (citing United Citizens of Chicago & Illinois v. Coalition to Let the People Decide in 1989, 125 Ill. 2d 332, 531 N.E.2d 802 (1988); Castaneda v. Illinois Human Rights Comm'n, 132 Ill. 2d 304, 318, 547 N.E.2d 437, 443 (1989); People v. Wallace, 57 Ill. 2d 285, 289-290, 312 N.E.2d 263, 266 (1974).

The portion of Section 16-111(i) quoted above requires the Commission to "consider", starting in 2007, whether a proposed rate for tariffed service exceeds a measure of "market value determined pursuant to Section 16-112."[4] Thus, Section 16-111(i) adds "market value" to the

[4] Section 16-112 specifies methods for calculating "market value." 220 ILCS 5/16-112. Those methods are not at issue in the case before this Court.

long list of factors[5] that the Commission must and may consider in the complex process of setting just and reasonable rates for service that has not been declared competitive. Further, Section 16-111(i) grants the Commission additional discretion to cap regulated rates for tariffed services at "market value plus 10%." This section of the PUA would make no sense if the market value were deemed to be just and reasonable on its own. 220 ILCS 5/16-111(i).

Section 16-111(i) makes clear that the General Assembly expects that, after January 1, 2007, the Commission will continue to set regulated rates for electric service that has not been declared competitive. This section also makes clear that while market prices are to be considered during the ratemaking process, they are not to be used in lieu of the statutorily required ratemaking process. The Commission's Orders, therefore, should be reversed because they improperly rely on the markets to set rates in the absence of a competitive declaration pursuant to 220 ILCS 5/16-113(a).

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[5] When setting "just and reasonable" rates, as required by 220 ILCS 5/9-201(c), the ICC considers, *inter alia*, the reasonableness of the company's expenses, including operations and maintenance, employee expense, supplies, customer service, taxes, and overhead**;** the amount of capital invested by the company, the portion that is supplied by investors and the portion that is provided by consumers or otherwise contributed and that is not entitled to a return; depreciation; depreciation reserve; deferred income taxes; the cost of equity and of short term and long term debt, and whether the fairness of the equity/debt ratio. See, *e.g.*, 83 Ill. Adm. Code, Section 200.285.

CONCLUSION

Based on the foregoing, the People respectfully request the Commission to stay Ameren's market-based tariffs for electric service that the Commission has not "declared competitive" from going into effect on January 2, 2007, pending final disposition of the Appeal currently pending in the Illinois Appellate Court, Second District under docket number 2-06-0381.

Respectfully Submitted,

The People of the State of Illinois
By LISA MADIGAN, Attorney General

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December 12, 2006

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY D/B/A Ameren/CILCO	)	
	)	No. 05-0160
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	
CENTRAL ILLIONOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS	)	
	)	No. 05-0161
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	
ILLINOIS POWER COMPANY d/b/a AmerenIP	)	
	)	No. 05-0162
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV	)	

NOTICE OF FILING

Please take note that on December 12, 2006, we submitted an Reply in Support of Emergency Motion to Stay Implementation of 2007 Tariffs for filing in the above-captioned proceeding via e-Docket with the Chief Clerk of the Illinois Commerce Commission at 527 E. Capitol Avenue, Springfield, Illinois 62701.

Susan Hedman
Office of the Illinois Attorney General

CERTIFICATE OF SERVICE

I, Susan Hedman, certify that the foregoing documents, together with a Notice of Filing were sent to the members of the Illinois Commerce Commission and all parties of record listed on the official service list by

email or regular mail with postage prepaid on December 12, 2006. Paper copies will be provided upon request.

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